SUPREME COURT, U.S.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1968

No. 221

HUBERT RAY STIDHAM,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA AND FOURTH DISTRICT COURT OF APPEAL, FLORIDA

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Petitioner prays that writ of certiorari issue to review the judgment of the Supreme Court of Florida, entered in the above entitled case on February 14, 1968, (A. 11) and the judgment of the District Court of Appeal, Fourth District of Florida, entered on November 14, 1967, (A. 1) rehearing in which was denied by said Court on December 13, 1967, (A.8).

CITATION TO OPINION BELOW

The opinion of the Fourth District Court of Appeal of Florida and order denying petition for rehearing are reported in 204 So.2d 359. The opinion of the Supreme

Court of Florida has apparently not been published in the official reports by the West Publishing Company. The record in this case is lodged with the Circuit Court of the Ninth Judicial Circuit in and for St. Lucie County, Florida.

JURISDICTION

The judgment of the District Court of Appeal of Florida, Fourth District was entered on November 14, 1967 and that of the Supreme Court of Florida on February 14, 1968. Petitioner's application for extension of time within which to take certiorari to this Court was granted on May 22, 1968 and Petitioner given to and including June 15th, 1968 within which to file this petition. The jurisdiction of this Court is invoked under 28 U.S.C., Sec. 1257(3), since a right and privilege is claimed under the Constitution of the United States.

QUESTION PRESENTED

Whether the Appellate Courts of Florida denied Petitioner due process of law and his right to trial by jury in affirming a conviction of murder in the third degree upon the ground that in their opinion the jury could have found Petitioner guilty of murder in the second degree, when there was patently no evidence at all to support a conviction of murder in the third degree, the jury has found Petitioner innocent of murder in the second degree and the Appellate Courts' finding as to possibility of guilt of second degree murder was wilful, purely speculative and based upon no substantial, competent evidence.

CONSTITUTIONAL PROVISIONS INVOLVED

Involved herein is that part of the 14th Amendment to the Constitution of the United States which provides that no State shall "deprive any person of life, liberty or property without due process of law", that portion of the Sixth Amendment of the Federal Constitution which provides that "In all criminal prosecutions, the accused shall enjoy the right to *** trial by an impartial jury ***," and that portion of the Seventh Amendment to the U. S. Constitution which provides that " *** no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law."

STATEMENT

Petitioner was indicted (S.A. 1) for murder in the first degree together with James Dale Purkhiser, John Philemon Luke and John Francis Henry in Broward County, Florida for the premeditated killing of one Catalina Flores, an 11 year old Puerto Rican girl. James Dale Purkhiser, who did the shooting which resulted in the death of the decedent, was tried separately on motion of other defendants, found guilty by jury without recommendation of mercy and sentenced to death in the electric chair. On direct appeal to the Supreme Court of Florida, this conviction was reversed and the lower court directed to enter judgment of guilty of second degree murder for the reason that there was in the opinion of the Supreme Court of Florida *insufficient evidence of premeditation* to support a judgment of first degree murder. This opinion has not been officially published but a copy of that issued in mimeograph form by the office of the clerk of the Su-

preme Court of Florida is attached hereto in the Supplementary Appendix (S.A. 2).

Petitioner and the other two co-defendants were tried at their request in St. Lucie County by jury. At the conclusion of the State's case, the Court directed a verdict in Defendant's favor as to first degree murder but let the case go to the jury on charges of second degree murder, third degree murder, manslaughter and not guilty at the conclusion of the trial. The jury found Petitioner and his two co-defendants, Luke and Henry, innocent of second degree murder but guilty of third degree murder.

Petitioner appealed to the District Court of Appeal of Florida, Fourth District, contending among other things that there was no evidence at all to support a conviction of third degree murder. The State conceded that there was no evidence to support murder in the third degree but contended in a highly colorable brief unsupported by the record that Petitioner could have been convicted of second degree murder (A. 4). The District Court of Appeal accepted this argument and affirmed Petitioner's conviction.

How Federal Question Is Presented. Upon receiving the opinion of the Court of Appeal affirming conviction for the reasons stated above, Petitioner filed his petition for rehearing with that court, alleging that affirmance of conviction in such a manner or by such a rationale deprived him of the benefit of trial by jury and in effect denied him trial by jury (A. 8). Upon denial of his Petition for rehearing, Petitioner filed his petition for writ of certiorari with the Supreme Court of Florida, again alleging that the manner in which his conviction had been sustained by the Court of Appeal violated his federally guaranteed

right to due process of law and trial by jury (A. 9). Upon denial of writ by the Supreme Court of Florida for the reason that no direct conflict with prior decisions of the Supreme Court of Florida had been shown, Petitioner has filed his Petition for writ of Certiorari with this Court.

REASONS FOR GRANTING THE WRIT

The Fourteenth Amendment to the Constitution of the United States denies the States the power to "deprive any person of life, liberty or property without due process of law." The Court looks increasingly to the Bill of Rights in resolving conflicting claims concerning the meaning of this spacious language. Many of the rights guaranteed by the first Eight Amendments have been held by this Court to be protected against State action by the due process clause of the Fourteenth Amendment — right to counsel, freedom of speech, etc. The test for determining whether the right to trial by jury extended by the Sixth Amendment with respect to federal criminal proceedings is also protected against state action by the 14th Amendment has been expressed in a variety of language, but essentially the reason for holding that such protection is afforded by the due process clause is that historically determination of guilt by jury is basic to our system of jurisprudence. The foregoing principles were just recently enunciated in *Duncan v. Louisiana*, 36 U.S. Law Week 4414 (May 21, 1968), so that the background issues raised by this petition have been decided. The principle issue raised by this petition is whether the appellate courts of the State of Florida have effectively denied petitioner his right to trial by jury of a serious offense (all degrees of homicide) by refusing to accord petitioner the benefit of a finding by jury of not guilty of second degree murder.

This Court has long considered that maintenance of the jury as a fact finding body is of such importance and occupies so firm a place in American history and jurisprudence that any seeming curtailment of the right to trial by jury should be scrutinized with utmost care. *Dimick v. Schiedt*, 293 U.S. 474, (1935).

Infringement upon the basic right to trial by jury may take any number of forms, and appellate action has long been recognized by this Court to be one source of denial of this fundamental right. *Dimick v. Schiedt, supra.*

Here petitioner had been convicted of murder in the third degree, which is defined as homicide perpetrated without any design to effect death while engaged in the commission of any felony other than those which support murder in the first degree — arson, rape, robbery, burglary, crime against nature and kidnapping. F.S. Sec. 782.04. It was admitted on appeal that there was no evidence to support such a conviction. No other felony was being committed at the time of the homicide, and the District Court of Appeal of Florida did not even make a finding in this regard. There was some intimation on the part of the State that the killing was done while in the commission of aggravated assault, a felony under Florida law. F.S. Sec. 784.04. This contention is patently frivolous because any homicide involves basically an assault on the person of another. In any event the Supreme Court of Florida in the companion case of *Purkhiser v. State* summarily disposed of this contention in petitioner's favor, expressly finding that no other felony was being committed. (S.A. 2).

In order to affirm petitioner's conviction of third degree murder, the Florida Court of Appeal proceeded to reexamine the entire record and concluded that from *its view of the evidence*, the jury could have found petitioner guilty of second degree murder, which is defined as unpremeditated homicide by any act imminently dangerous to another and evincing a depraved mind regardless of human life.

The reason why the jury acquitted petitioner of murder in the second degree is that there is absolutely no evidence to support such a conviction. Petitioner was awakened at night in his home and prevailed upon by one James Purkhiser to accompany Purkhiser up to a migrant worker camp near Pompano Beach to insure that he had a "fair fight" with a fellow named Miguel Rivera, whose friends (some 20 in number) had earlier that evening administered a vicious beating to Purkhiser and a companion named Charles K. Smith. To accomplish this purpose, Purkhiser had collected some 15 others who were in a panel truck outside petitioner's home. There was no talk of shooting anyone. The aforementioned group was labeled "an armed unit" by the Court of Appeal. This so-called armed unit had one member a 17 year old girl who was "armed" with a baseball bat and a billy, This young woman was the star witness for the State (A. 68-124). One person, apparently Roy Griffin, had a pistol, and there was also a tire iron in the back of the truck. This is the extent of the armament of this so-called armed force. The Court's attention is called to this language because of the wilful, even violent nature of the action taken by the Florida Court of Appeal. Hyperbole has its uses in the language but there is no place for it in the dispassionate review of criminal appeals.

The Court of appeal also found that petitioner evinced a "depraved mind" by joining such a group for such an expedition. The jury did not think so, and this Court can take judicial notice that such conduct does not manifest a depraved state of mind, however ill advised and rambunctious. This petition does not involve a Boy Scout troop but it is concerned with murder, and the depravity of mind necessary to this crime cannot be predicated as has been attempted by the Florida Court of Appeal.

Petitioner could not have been found guilty of second degree murder because he was at the time of the homicide engaged in no act "imminently dangerous to another". Petitioner was not close to Purkhiser when the latter suddenly commenced shooting, had no weapon of any kind, did or said nothing to aid or abet Purkhiser in the homicide except possibly looking into a window and stating that the occupants were armed and to look out (A. 81-82). Petitioner not only had no weapon himself but did not know that Purkhiser had a weapon on his person and did not see the latter draw this weapon. Petitioner after the shooting did drive the panel truck back to the southern part of the County, but at this time it was unknown whether a crime had been committed and all these people could not do otherwise as a practical matter. Gerry Fields, the young woman already referred to, testified that someone said after petitioner got into the truck that "Yeah, we got Stidham and we have got his gun, too." (A. 78). Trial counsel let this hearsay statement into the record because he wanted to get some hearsay evidence in the record himself (A. 174), but it is still hearsay and incompetent to support a verdict or judgment. There was testimony that petitioner tried to make up an alibi, but this immaterial except to support an inference that peti-

tioner thought he was in "hot water", and certainly this was the case. (A. 133). The fact that a person has been convicted of crime and makes some statement about a funeral if he has to go back to prison is not evidence upon which a judgment can be sustained, and the manner in which this evidence was brought out in this cause was highly prejudicial (A. 165, 170, 216).

It is not surprising that the jury in this case acquitted petitioner of the charge of second degree murder. As a matter of fact, this is in conformity with the recent ruling by the Supreme Court of Florida in the companion case of *Purkhiser v. State* (S.A. 2) that the person who actually did the shooting and committed the homicide could be guilty at most of only second degree murder.

Included in the Supplemental Appendix is the material portion of the State's Brief in the District Court of Appeal. The inflammatory character of this document helps explain the decision rendered, and employment by the Appellate Court of a phrase like "a new breed of men". While there may be something new under the sun, this Court can take notice there is no new breed of men. The Court will notice the repeated employment of the term "it appears" in this argument and similar language. There is nothing in the record to support these assertions.

Practically all the testimony has been incorporated in the Appendix to this Petition, and a careful examination of this testimony will bear out petitioner's contention that there is simply no evidence to support a conviction of any degree of homicide.

Accordingly, petitioner respectfully submits that the appellate courts of Florida in affirming a conviction of third degree murder, of which there was admittedly no evidence at all, by finding evidence to support second degree, when there was no such evidence, and in denying petitioner the benefit of the jury's finding in this regard, denied to petitioner due process of law and specifically his fundamental right to trial by jury.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

JOHN M. McCANTS
Counsel for Petitioner

June ___ 1968.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing petition for writ of certiorari has, pursuant to Rule 33 (1) of the Revised Rules of the Supreme Court of the United States, been served upon Honorable Earl Faircloth, Attorney General of Florida, Tallahassee, Florida and upon Honorable James T. Carlisle, Assistant Attorney General, P. O. Box 640, Vero Beach, Florida by mail this ____ day of June, 1968.

JOHN M. McCANTS

SUPPLEMENTAL APPENDIX

Filed for Record December 17, 1965. Clerk, Circuit Court, Broward County, Florida.

INDICTMENT

In the Circuit Court of the Seventeenth Judicial Circuit of the State of Florida, for Broward County, at the Fall Term thereof in the year of our Lord One Thousand Nine Hundred and Sixty-five to-wit: The Grand Jurors of the State of Florida, inquiring in and for the body of County of Broward upon their oaths do present that James Purkhiser, John Philemon Luke II, John Francis Henry aka Chico, Hubert Ray Stidham late of the County of Broward aforesaid in the Circuit and State aforesaid, did on the 5th day of December in the year of our Lord One Thousand Nine Hundred and Sixty-five with force and arms at and in the County of Broward aforesaid unlawfully and feloniously and from a premeditated design to effect the death of Catalina Flores, a human being, did kill and murder her, the said Catalina Flores, by shooting her with a pistol.

against the form of the statute in such case made and provided to the evil example of all others in the like case offending, and against the peace and dignity of the State of Florida.

Quentin V. Lang
State Attorney for the Seventeenth Judicial Circuit of the State of Florida, Prosecuting for said State

OPINION — SUPREME COURT OF FLORIDA
PURKHISER vs. STATE

DREW, J.

The appeal in this case is from a judgment of conviction entered upon a jury verdict finding defendant guilty of first degree murder without recommendation of mercy, and sentence of death imposed thereon in the Circuit Court for St. Lucie County.

Alleged procedural errors and constitutional arguments presented by appellant are in our opinion without merit. We conclude, however, from examination of the voluminous record that the court erred in presenting to the jury the issue of premeditation over defendant's motion for directed verdict on this point.

The evidence clearly sustains a charge of murder in the second degree. The homicide victim, an eleven year old girl, was shot in her home during a sudden and brief encounter between her father and the defendant, who came to the door in search of another man with whom he had quarreled earlier in the day. We think no purpose would be served by a detailed review of the preliminary events, beyond our considered conclusion that the record contains no charge or proof, direct or circumstantial, that the homicide occurred in the commission of a felony. Evidence relative to the fatal encounter, during the period of less than two minutes that defendant was at the scene, makes no reference to poor visibility or mistaken identity by the defendant, to whom all persons in the home at the time were complete strangers. Eyewitness testimony was that the fatal shots were discharged suddenly as defend-

ant turned toward a doorway to an adjacent room from which someone was moving. While the duration of intent may be quite immaterial, it is clear that under our law[1] an indispensable element of a charge of first degree murder is that the killing must result "from a premeditated design to effect the death of [a] human being." We find in this case no evidence upon which such a conclusion can lawfully be based.

The judgment of conviction and the sentence of death by electrocution is reversed and the cause is hereby remanded to the trial court to enter judgment and appropriate sentence for murder in the second degree.[2]

It is so ordered.

THOMAS, THORNAL and BARNS (Ret), JJ., concur
CALDWELL, C.J., ROBERTS and ERVIN, JJ., dissent

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[1]Sec. 782.04, F.S.:

"The unlawful killing of a human being, when perpetrated from a premeditated design to effect the death of the person killed or any human being, or when committed in the perpetration of or in the attempt to perpetrate any arson, rape, robbery, burglary, abominable and detestable crime against nature or kidnaping, shall be murder in the first degree, and shall be punishable by death."

[2] "924.34 When evidence sustains only conviction of lower offense. — In a case where the offense is divided into degrees or necessarily includes lesser offenses, and the appellate court is of the opinion that the evidence does not prove the degree or offense of which the defendant is found guilty, but does establish his guilt of some lesser degree or offense necessarily included therein, then the appellate court shall reverse the judgment of the trial court with directions to the trial court to enter judgment for such lesser degree or offense necessarily included in the charge and pass sentence accordingly, unless some other matter or thing appearing in the record makes it advisable that a new trial be had."

EXCERPT—STATE'S BRIEF—

COURT OF APPEAL

ARGUMENT

POINT I

THE EVIDENCE WAS SUFFICIENT TO SUSTAIN THE JUDGMENT OF GUILT OF MURDER IN THE THIRD DEGREE.

Section 919.14, Florida Statutes, requires the Court to define all degrees of unlawful homicide, including manslaughter, included in the Indictment, whether factually applicable or not and to further instruct that it is in the province of the jury to determine the degree. *Wilson v. State*, (Fla. App. 1965) 171 So.2d 903. If a particular degree is charged, the verdict may be that of guilty of that degree or any lesser degree. In other words, where the commission of the crime charged is proved, the defendant is not in a position to complain of his conviction for an offense of lesser degree. Where there is evidence to sustain a verdict of murder in the second degree, a verdict of murder in the third degree will not be disturbed on the ground that the evidence is not sufficient to support a verdict of that degree of homicide, *Prevatt v. State*, (Fla. 1921) 82 Fla. 284, 89 So. 807. Even the fact that the evidence does not make out a case of murder in the third degree is no ground for the granting of a motion for a new trial, if the evidence is capable of sustaining a verdict of a higher degree, *Johnson v. State*, (Fla. 1908) 46 So. 174; *Clemmons v. State*, (Fla. 1901) (43 Fla. 200, 30 So. 699.

In the case at bar, the appellants were charged with first degree murder. *The trial court directed a verdict of not guilty as to first degree murder.* A verdict of second or third degree murder would have been proper if the evidence was sufficient to support a verdict of the higher degree. *Likewise, a verdict of third degree murder is proper if the evidence was sufficient to support a verdict of second degree murder.*

The evidence was sufficient to support a verdict of second degree murder. *Second degree murder is no more than a homicide committed without premeditation.* The unlawful killing of a human being, when perpetrated by any act imminently dangerous to another and evincing a depraved mind regardless of human life, although without any premeditated design to effect the death of any particular individual is murder in the second degree, Section 782.04, Florida Statutes. The meaning of the words

"evincing a depraved mind regardless of human life" has been crystalized by judicial decisions. Conduct evincing a depraved mind regardless of human life is exemplified in *Storey v. State*, (Fla. 1943) 153 Fla. 185, 13 So.2d 912, where the defendant, following a traffic accident in which the deceased was involved, seized the deceased, dragged him from his seat in the truck onto the roadway where he beat him about the head and face. As the deceased was jerked feet first from his seat his head struck the running board and then the pavement of the highway. In holding that the defendant must be presumed to have intended the natural consequences of these acts, the Court upheld a conviction of second degree murder. In *Parrish v. State*, (Fla. App. 1957) 97 So.2d 356, the defendant chased the deceased, a young woman alone in a car at night in mortal

fear of her life, so that she disregarded a stop sign and drove at a high rate of speed into a through street and in so doing ran into another car and received fatal injuries. It was held that this conduct evinced *a depraved mind regardless of human life.*

If the death of a human being was a *natural and probable consequence of appellants' actions, then the evidence was sufficient to support a verdict of second degree murder.* In this connection, it must be remembered that appellants were part of a well-armed task force that went to a Puerto Rican labor camp for the express purpose of having one of their members fight one of the Puerto Ricans. This was nothing more than a homicide looking for a place to happen. It was certainly *reasonable to expect* that when this armed band reached the labor camp that the ensuing fight would not be restricted to Purkhiser and Rivera, but also that the Puerto Ricans would retaliate. *It is certainly not improbable to expect that a death would result.*

But the appellants were not content to let it stop there. Upon arrival at the house, which they thought to be Rivera's, Henry, armed with the ax, and Luke followed on Purkhiser's heels to the door of the Flores' home. Purkhiser threw open the door and pointed the gun at Navarro. He began to make inquiry of Navarro as to whether Navarro remembered him from the fight earlier that day. *The record reflects that Luke and Henry were in a position to see the gun.* They made no effort to stop Purkhiser. Nor did they abandon his cause.

Thus *it appears* that Luke and Henry knew that Purkhiser was armed with a pistol, at least from the time that the door was opened. It also *appears* that they *continued*

to aid and assist Purkhiser despite the fact that they now knew that this was no longer a fight with fists, but also that a gun was involved. While it may be true that the appellants did not intend that Purkhiser shoot anyone, the fact remains that they set out with the *intent to aid Purkhiser in a criminal act, that is, a fight with Rivera, and continued to aid him in an aggravated assault.* Appellants conspired with Purkhiser to assist Purkhiser in fighting with Rivera. *Appellants aided and abetted Purkhiser in an aggravated assault.*

Once Purkhiser drew the gun and Henry and Luke saw the gun, they could reasonably have foreseen that a death could occur.

> "This liability (liability for homicide) does not extend to every accidental result of the acts of fellow conspirators. It covers only such actions as could reasonably have been foreseen to occur or such as would probably happen in the execution of the conspiracy. Thus, *if two combined fight a third with fists, and death accidentally results from a blow inflicted by one, the other would also be answerable. But if the one resorts to a deadly weapon without the other's knowledge or consent, he only is liable.* In the latter case, the party who did not strike the blow could not reasonably have foreseen the use of a deadly weapon by his co-conspirator." 16 *Fla. Jur.*, Homicide, Sec. 29, page 373.

The above text is quoted for the purpose of showing how this case differs from the situation quoted in the text,

Here, resort to a deadly weapon was with the consent of the appellants. Here, *appellants could reasonably have foreseen the use of the deadly weapon by Purkhiser, because they knew that he had the gun, and Luke and Henry, at least, knew that he was pointing the gun into the Flores' home at Luis Navarro.* In *Myers v. State,* (Fla. 1901) 43 Fla. 500, 31 So. 275, it was held that a conspirator may be guilty of a wrong he did not specifically intend, if it was a natural result of, or happened accidentally through, some other specific or general evil purpose. So also it was held in *Coston v. State,* (Fla. 1939) 139 Fla. 250, 190 So. 520, that an unintended wrong, ensuing as a natural and probable consequence of an intent to do wrong, *derives its character from the general evil intent.* Here, the general evil • • •